IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner,

-v-

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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1. The Government concedes that the record in this case discloses no necessity whatever for the trial judge's declaration of mistrial. This concession is decisive for a reversal of the judgment of conviction below.

The Government characterizes the trial court's action variously as "an error by the court as to the necessity for a mistrial" (Gov't. Br. 36), as "mere error" (*Id.* 8), as based upon "imagined impropriety of Government counsel" (*Id.* 9), and as "seemingly capricious" (*Id.* 43). The Government makes no effort to establish that the action of the trial court in any way served the purposes of justice or any public interest whatever. In short, the Government concedes that there was no necessity at all for the action of the trial court.

United States v. *Perez*, 9 Wheat. 579, the touchstone of all decisions on this question, makes it clear that, unless

there was "a manifest necessity for the . . . [declaration of mistrial] or the ends of public justice would otherwise be defeated," the defendant cannot be retried, and that the power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." Since here, unquestionably, there was no necessity at all for the action of the trial judge, petitioner's plea of double jeopardy must be sustained.

2. The Government argues, however, that, even in a case, such as this one, in which there is no necessity for the declaration of a mistrial—even if the judge's action in declaring a mistrial be arbitrary and capricious—the bar of double jeopardy does not attach unless the defendant affirmatively demonstrates that the mistrial declaration resulted from some malevolent motive of the prosecutor or of the trial judge to oppress him or would result in some extraordinary prejudice to him.

The Government would require a defendant to establish that "under all the circumstances a second trial would subject the defendant to oppression or harassment" (Gov't. Br. 27) or that "the second trial represents a governmental effort to harass or oppress a defendant by successive trials" (*Id.* 32).

We know of no case supporting such a rule, and the Government cites none. In all cases of which we are aware, the reviewing courts have addressed themselves to the issue whether the declaration of mistrial was a sound exercise of judicial discretion predicated upon necessity manifested in the record. In no case has a court, finding no necessity of record for mistrial, sanctioned a retrial of the defendant

because he failed to sustain the burden which the Government would here place on petitioner.

The courts have uniformly held that jeopardy attaches either when the jury is impaneled or evidence introduced. At such point, a constitutional right to have the trial go forward to conclusion vests in the defendant. That right, in appropriate circumstances, has been subordinated to the interests of justice. However, when, as in the present case, the declaration of mistrial admittedly has served no interest of justice, the Constitution commands that the defendant not be tried again.

Not only is the rule for which the Government contends, so far as we know, unsupported by any of the decided cases; it would be impossible to apply. The constitutional protection against double jeopardy is designed in part to assure "that an accused shall not have to marshal the resources and energies necessary for his defense more than once . . . [and] '. . . that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity . . .'" *Abbate* v. *United States*, 359 U. S. 187, 199 (opinion of Brennan, J.). Is then a trial judge considering the declaration of a mistrial or a reviewing court to inquire as to the particular defendant's financial resources, his capacity to withstand the emotional stresses of successive trials, his ability to produce witnesses at a later date, the availability of counsel at a later date, and as to like matters touching upon the burden which would result to him from retrial? Are constitutional rights to turn upon such quantitative in-

quiries? And, since the answer to such inquiries must differ from individual to individual, does not such a rule raise serious questions as to equal protection of the laws?

Insofar as the rule looks to the motives of the prosecutor or the trial judge, in seeking or ordering a new trial, is proof of such motives to be adduced? If not, are subsequent courts reviewing the declaration of mistrial to speculate whether the prosecutor or the judge acted merely erroneously or was motivated by malevolent intent to harass and oppress the defendant?

Moreover, why should the application of the constitutional protection against double jeopardy turn on the motives of the prosecutor or the judge? We know of no instance in Anglo-American law in which an appellate court is required to consider not only the correctness of a trial judge's action but his motives in taking such action as well.

It is clear therefore that, when there is no necessity for the declaration of a mistrial, the constitutional prohibition against exposing the defendant to double jeopardy precludes a second trial. Whatever may be the countervailing considerations of public justice which, in a particular case, might justify a second trial, no such considerations are present in this case, and the judgment of conviction must be reversed.

3. Reading *Perez* in a manner which it admits has not "fared so well" in this Court and in other federal courts (Gov't. Br. 24), the Government, by a rationale not entirely clear, apparently argues that *Perez* supports retrial after a declaration of mistrial even where there is no nec-

essity for the mistrial. The Government reads *Perez* as holding "that the termination of a trial short of verdict . . . never bar[s] a subsequent trial" (Gov't Br. 7). The rule of *Perez*, says the Government, is that the action of a trial court in declaring a mistrial is in no circumstance reviewable, that "even an erroneous discharge [of a jury before verdict] would not operate to bar a second trial" (Gov't. Br. 21). In short, *Perez*, as the Government construes it, reads mistrial situations out of the double jeopardy clause of the Fifth Amendment.

As we shall presently demonstrate, *Perez* stands for no such doctrine. Whether or not it does, however, the fact is that the Government does not urge such a rule here. As we have indicated, the Government recognizes that this rule, if ever *Perez* announced it, is no longer viable.

The Government concedes that there are circumstances in which a declaration of mistrial precludes a second trial.*

Once the Government abandons its radical construction of *Perez* and recognizes, as it does, that mistrial declarations are reviewable, what remains pertinent in *Perez* are the criteria that decision enunciates for the sound exercise of discretion by the trial judge. It is difficult then to see how *Perez* in any sense supports the rule for which the Government contends. For, there is no need to engage in any conjecture as to the criteria laid down by *Perez*. The

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* Indeed, the Government goes so far as to support the prohibition of retrials in some situations even where the defendant himself moves for the mistrial: ". . . If the mistrial is induced for purposes of oppression or harassment—*e.g.*, if it were deliberately provoked by a prosecutor in order to obtain more evidence—it ought to bar a retrial even if the defendant were forced to move for the termination of the trial to protect himself against prejudicial tactics . . ." (Gov't. Br. 40).

opinion is perfectly explicit: mistrials may be declared only in cases of "manifest necessity" or where "the ends of public justice would otherwise be defeated" and only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . ." (9 Wheat. at 580). It is equally plain that these criteria have not here been satisfied.

In any event, in our view, the Government's reading of *Perez* is incorrect. In *Perez*, the Court dealt with two types of situations arising under the double jeopardy clause. In cases where the accused has been convicted or acquitted, there is no question that a retrial for the same offense is barred. In cases, however, where the "prisoner has not been convicted or acquitted", but where the trial has been terminated by a mistrial, he may be retried only if the mistrial, "taking all the circumstances into consideration", has been predicated upon the grounds set forth in the Court's opinion.

In attempting to support its reading of *Perez*, the Government relies upon *United States* v. *Haskell*, 4 Wash. C.C. 402, 26 Fed. Cases 207 (No. 15321), decided prior to *Perez* on circuit by Mr. Justice Washington, one of the justices participating in the *Perez* decision, and on *United States* v. *Gibert*, 25 Fed. Cases 1287 (No. 15204), decided by Mr. Justice Story on circuit some ten years after *Perez*.

Neither of these cases, however, supports the Government's reading of *Perez*. *United States* v. *Haskell*, *supra*, involved a purely procedural question as to how a claim of an impermissible retrial might be raised. Although Mr. Justice Washington was apparently of the view that the double jeopardy clause of the Fifth Amendment was not

applicable to mistrial situations, what is of crucial significance here is that he expressly indicated that an improper declaration of mistrial might, notwithstanding, preclude a second trial, stating: "We do not deny to a prisoner the opportunity to avail himself of the improper discharge of the jury as equivalent to an acquittal, since he may have all the benefit of the error, if committed, by a motion for his discharge, or upon a motion in arrest of judgment". Mr. Justice Washington merely held that objection to a retrial after earlier declaration of a mistrial could not be raised by a plea in bar.

Gibert held that a defendant could not move for a new trial after a conviction. Neither the decision nor the opinion, however, indicates that Mr. Justice Story believed that the double jeopardy clause of the Constitution does not embrace declarations of mistrial as well as instances of acquittal or conviction. After reviewing the state precedents embodying certain divergencies of view with respect to the application of the double jeopardy clause, Mr. Justice Story directed himself specifically to those precedents which held that the double jeopardy clause does apply to declarations of mistrial and stated: "It was (as I think) among other things, to get rid of the terrible precedents on this subject alluded to by Lord Hale . . . in discharging juries from giving verdicts upon frivolous or oppressive suggestions, that this great maxim of the common law was ingrafted into the Constitution." Justice Story thus made it clear that retrial after unjustified declaration of mistrial is prohibited by the double jeopardy clause and that indeed the correction of such abuses was one of the chief purposes for the adoption of the double jeopardy clause.

4. In addition to the major contentions of the Government, discussed above, certain additional arguments are suggested by the Government's brief.

(a) In light of the Government's unequivocal statement, in opposing certiorari, that "the question of waiver by consent does not play a part in this case" (Brief in opposition, p. 7), we are frankly surprised that it now urges that "defense counsel not only acquiesced in the order [of mistrial] but, to some extent, encouraged it" (Gov't. Br. 33). If the Government is now contending that petitioner consented to the mistrial and has thereby waived his constitutional rights, we submit that there is no basis at all in the record for such contention. For, there was no opportunity whatever to object to the wholly unexpected and vehement declaration of mistrial. On this point, we respectfully refer the Court to our main brief at pages 28-29.

Moreover, the argument that, by objecting to certain of the questions asked by Government counsel, defense counsel "encouraged" a declaration of mistrial is wholly untenable. The distinction between objecting to questions and moving for a mistrial is apparent and requires no further elaboration. Is a defense counsel to be inhibited from interposing objections to questions lest such objections later be treated as veiled motions for a mistrial? "Encouragement", if any there was, is certainly not the legal equivalent of a waiver of the constitutional objection to a second trial. It is also significant and somewhat curious to note that the Government construes the prosecutor's silence as evidencing objection whereas it construes defense counsel's silence as evidencing consent (Gov't. Br. 33).

(b) In attempting to refute the doctrine of Judge Waterman's dissent, that a declaration of mistrial declared without the consent of the accused and predicated upon prosecution misconduct should bar a second trial, the Government makes certain procedural arguments concerning the effect of such a rule.

The Government first contends that, if a mistrial on this ground cannot be declared without the consent of defense counsel, "'counsel will often find it advantageous to play the waiting game" (Gov't. Br. 38). It is clear, however, that such a "waiting game" cannot be played. If error is made, counsel can, of course, object to such error, and curative instructions can be given by the trial judge. If, however, counsel is of the opinion that such instructions are not sufficient to cure the error, he must move for a mistrial or else be barred from contending on appeal that such error was not cured by the instructions and that a mistrial should have *sua sponte* been declared. *Devine* v. *United States*, 278 F. 2d 552 (C.A. 9); *Claunch* v. *United States*, 155 F. 2d 261 (C.A. 5); *Etie* v. *United States*, 55 F. 2d 114 (C.A. 5).

The Government further argues that in the case of multiple defendants such a rule would be unworkable. However, a judge confronted with the situation in which only some defendants consent to a mistrial can, of course, sever and obviate this difficulty.

The Government's contention that the rule for which we contend is inflexible and therefore contrary to the spirit of *Perez* is likewise untenable. Flexible rules often have particular well-defined applications. The case of jury dis-

agreement is a similar instance of crystallization in this area.

It is well settled that a prosecutor who feels that he will be unable to convict cannot *nolle pros* a case in order that a subsequent attempt to convict the accused can be made. We submit that Judge Waterman's view that a prosecutor should not be permitted to do indirectly what he cannot do directly should be adopted. Prosecution misconduct should never be the basis for subjecting the defendant to a second trial without his consent.

(c) The Government states that "[p]etitioner seeks to have set aside a conviction, the validity of which he does not question . . ." (Gov't. Br. 9). Needless to say, petitioner does challenge his conviction on the most fundamental of grounds—*i.e.*, that such conviction violates the United States Constitution. The Government's argument, given any force, would effectively nullify the double jeopardy provision in all cases. The purpose of the double jeopardy clause is to protect the defendant from the harassment of successive trials, and whether a second trial would result in an acquittal or a conviction is wholly irrelevant, for the policy can only have meaning if such a second trial is prohibited.

There are, of course, many instances in which countervailing policy considerations designed to protect individual liberty from governmental intrusion result in restraints upon prosecutions for crime. Statutes of limitation are obvious examples. In order to protect the defendant from being subjected to a trial which, by the passage of time, he is ill-equipped to defend, the state is prevented by such

statutes from bringing a prosecution no matter how strong may be the evidence at its command establishing the defendant's guilt. Exclusionary rules of evidence, such as the privilege against self-incrimination and the rule excluding coerced confessions, likewise, to some extent, inhibit prosecutions in order to protect the individual from oppressive governmental action. See *Rogers* v. *Richmond*, — U. S. —, No. 40, O.T. 1960.

The Government's argument that petitioner's subsequent conviction has any bearing on the question of whether he has been deprived of his constitutional freedom from double jeopardy is therefore wholly untenable and runs counter to the numerous decisions of this Court which recognize that the interest of the state in prosecuting crimes cannot be the basis for depriving the individual of his constitutional protections against governmental oppression.

CONCLUSION

Even if the decisions of this Court concerning permissible retrial after the declaration of a mistrial are to be read as holding that the interests of the accused in being protected from a second trial are to be balanced against the interests of public justice in having the first trial terminated and the defendant subjected to a second trial, the judgment below cannot stand. There is divergence between the Government's view and ours with respect to this balancing process. We submit, however, that since in the present case there unquestionably was no necessity at all for the declaration of mistrial and since no public interest has here been shown to balance against petitioner's valued constitutional rights,

the judgment below must be reversed and acquittal of petitioner directed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 486.—October Term, 1960.

Dante Edward Goff, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In view of this Court's prior decisions, our limited grant of certiorari in this case [1] brings a narrow question here. We are to determine whether, in the particular circumstances of this record, petitioner's conviction at his second trial [2] for violation of 18 U. S. C. § 659,[3] after his first trial had been terminated by the trial judge's declaration of a mistrial *sua sponte* and without petitioner's "active and express consent," [4] violates the Fifth Amendment's prohibition of double jeopardy. The Court of Appeals for the Second Circuit *in banc* affirmed petitioner's conviction (one judge dissenting), holding his constitutional objection without merit. 282 F. 2d 43. We agree that the Fifth Amendment does not require a contrary result.[5]

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[1] 364 U. S. 917.

[2] Prior to the proceedings in the two trials which are relevant for present purposes, denominated the "first" and "second" trials herein, there had been a mistrial granted upon motion of petitioner.

[3] The statute makes unlawful, *inter alia*, the receipt or possession of any goods stolen from a vehicle and moving as, or constituting, an interstate shipment of freight, knowing the good to be stolen.

[4] 282 F. 2d 43, 46.

[5] We cannot, of course, determine what result would obtain had the Court of Appeals, in light of its close acquaintance with the local situation, decided that petitioner's mistrial operated to bar his further prosecution, and were such a decision before us.

Petitioner was brought to trial before a jury in the District Court for the Eastern District of New York on February 4, 1959, on an information charging that he had knowingly received and possessed goods stolen in interstate commerce. That same afternoon, during the direct examination of the fourth witness for the Government, the presiding judge, on his own motion and with neither approval nor objection by petitioner's counsel,[6] withdrew a juror and declared a mistrial. It is unclear what reasons caused the court to take this action, which the Court of Appeals characterized as "overassiduous" and criticized as premature.[7] Apparently the trial judge inferred that the prosecuting attorney's line of questioning presaged inquiry calculated to inform the jury of other crimes by the accused, and took action to forestall it. In any event, it is obvious, as the Court of Appeals concluded, that the judge "was acting according to his convictions in protecting the rights of the accused." 282 F. 2d, at 46. The court below did not hold the mistrial ruling erroneous or an abuse of discretion. It did find the prosecutor's conduct unexceptionable and the reason for the mistrial, therefore, not "entirely clear."

[6] In light of our disposition, we need not reach the Government's suggestion that petitioner's failure to object to the mistrial adversely affects his claim. We note petitioner's argument that, because of the precipitous course of events, there was no opportunity for such objection.

[7] "The colloquy [immediately preceding the mistrial] . . . demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. . . ." 282 F. 2d, at 46.

It did say that "the judge should have awaited a definite question which would have permitted a clear-cut ruling," and that, in failing to do so, he displayed an "overzealousness" and acted "too hastily." *Id.*, at 46, 48. But after discussing the wide range of discretion which the "fundamental concepts of the federal administration of criminal justice" allow to the trial judge in determining whether or not a mistrial is appropriate—a responsibility which "is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal," *id.*, at 47—and the corresponding affirmative responsibility for the conduct of a criminal trial which the federal precedents impose, it concluded:

> "On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. . . ." *Id.*, at 48.

Certainly, on the skimpy record before us[*] it would exceed the appropriate scope of review were we ourselves to attempt to pass an independent judgment upon the propriety of the mistrial, even should we be prone to do so—as we are not, with due regard for the guiding familiarity with district judges and with district court conditions possessed by the Courts of Appeals.

On March 9, 1959, petitioner moved to dismiss the information on the ground that to try him again would

[*] The record here contains, with respect to the February 4 trial, two paragraphs from the Government's opening, four paragraphs from the petitioner's opening, a six-line colloquy between the court and prosecuting counsel, a portion of the examination of the third of the Government's first three witnesses, and the entire transcript of the testimony of the fourth witness. The latter two items are set out in the affidavit of the Assistant United States Attorney in opposition to petitioner's motion to dismiss the information following the mistrial.

constitute double jeopardy. The motion was denied and he was retried in April. He now attacks the conviction in which the second trial resulted.

In this state of the record, we are not required to pass upon the broad contentions pressed, respectively, by counsel for petitioner and for the Government. The case is one in which, viewing it most favorably to petitioner, the mistrial order upon which his claim of jeopardy is based was found neither apparently justified nor clearly erroneous by the Court of Appeals in its review of a cold record. What that court did find and what is unquestionable is that the order was the product of the trial judge's extreme solicitude—an over-eager solicitude, it may be—in favor of the accused.

Since 1824 it has been settled law in this Court that "The double jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade* v. *Hunter*, 336 U. S. 684, 688. *United States* v. *Perez*, 9 Wheat. 579; *Thompson* v. *United States*, 155 U. S. 271; *Keerl* v. *Montana*, 213 U. S. 135, 137–138; see *Ex parte Lange*, 18 Wall. 163, 173–174; *Green* v. *United States*, 355 U. S. 184, 188. Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Simmons* v. *United States*, 142 U. S. 148; *Logan* v. *United States*, 144 U. S. 263; *Dreyer* v. *Illinois*, 187 U. S. 71, 85–86. It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best

served . . . ." *Brock* v. *North Carolina*, 344 U. S. 424, 427,[5] and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. See *Lovato* v. *New Mexico*, 242 U. S. 199; cf. *Wade* v. *Hunter*, *supra*. In the *Perez* case, the authoritative starting point of our law in this field, Mr. Justice Story, for a unanimous Court, thus stated the principles which have since guided the federal courts in their application of the concept of double jeopardy to situations giving rise to mistrials:

> ". . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office . . . ." 9 Wheat., at 580.

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[5] *Brock* v. *North Carolina* was a state prosecution and therefore arose, of course, under the Due Process Clause of the Fourteenth Amendment. The passage quoted from *Brock*, however, related to the application in federal prosecutions of the double jeopardy provision of the Fifth.

The present case falls within these broad considerations. Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused. Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. It would hark back to the formalistic artificialities of seventeenth century criminal procedure so to confine our federal trial courts by compelling them to navigate a narrow compass between Charybdis and Scylla. We would not thus make them unduly hesitant conscientiously to exercise their most sensitive judgment—according to their own lights in the immediate exigencies of trial—for the more effective protection of the criminal accused.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 486.—October Term, 1960.

Dante Edward Gori, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 12, 1961.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Black and Mr. Justice Brennan concur, dissenting.

The place one comes out, when faced with the problem of this case, depends largely on where one starts.

Today the Court phrases the problem in terms of whether a mistrial has been granted "to help the prosecution" on the one hand or "in the sole interest of the defendant" on the other. The former is plainly in violation of the provision of the Fifth Amendment that no person shall ". . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." That was what we said in *Green* v. *United States*, 355 U. S. 184, 188. But not until today, I believe, have we ever intimated that a mistrial ordered "in the sole interest of the defendant" was no bar to a second trial where the mistrial was not ordered at the request of the defendant or with his consent. Yet that is the situation presented here, for the Court of Appeals found that the trial judge "was acting according to his convictions in protecting the rights of the accused." [1]

There are occasions where a second trial may be had, although the jury which was impanelled for the first trial

[1] In this case the trial judge said:

"I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney."

was discharged without reaching a verdict and without the defendant's consent. Mistrial because the jury was unable to agree is the classic example; and that was the critical circumstance in *United States* v. *Perez*, 9 Wheat. 515; *Logan* v. *United States*, 144 U. S. 263; *Dreyer* v. *Illinois*, 187 U. S. 71; *Moss* v. *Glenn*, 189 U. S. 506; *Keerl* v. *Montana*, 213 U. S. 135. Tactical situations of an army in the field have been held to justify the withdrawal of a court-martial proceeding and the institution of another one in calmer days. *Wade* v. *Hunter*, 336 U. S. 684. Discovery by the judge during the trial that "one or more members of a jury might be biased against the Government or the defendant" has been held to warrant discharge of the jury and direction of a new trial. *Id.*, 689. And see *Simmons* v. *United States*, 142 U. S. 148; *Thompson* v. *United States*, 155 U. S. 271. That is to say, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." [2] *Wade* v. *Hunter*, *supra*, 689. While the matter is said to be in the sound discretion of the trial court, that discretion has some guidelines—"a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." *Id.*, 690.

To date these exceptions have been narrowly confined. Once a jury has been impanelled and sworn, jeopardy attaches and a subsequent prosecution is barred, if a mistrial is ordered—absent a showing of imperious neces-

[2] In *Lovato* v. *New Mexico*, 242 U. S. 199, 201, the jury was dismissed so that the defendant could be arraigned and could plead; and it was then impanelled again. The case stands for no more than the settled proposition that "a mere irregularity of procedure" does not always amount to double jeopardy.

sity.[3] As stated by Mr. Justice Story in *United States* v. *Coolidge*, 25 Fed. Cas. No. 14, 858, the discretion is to be exercised "only in very extraordinary and striking circumstances."

That is my starting point. I read the Double Jeopardy Clause as applying a strict standard. "The prohibition is not against being twice punished; but against being twice put in jeopardy." *United States* v. *Ball*, 163 U. S. 662, 669. It is designed to help equalize the position of government and the individual, to discourage abusive use of the awesome power of society. Once a trial starts jeopardy attaches. The prosecution must stand or fall on

[3] See *United States* v. *Watson*, 28 Fed. Cas. 499; *United States* v. *Whitlow*, 110 F. Supp. 874; *Ex parte Ulrich*, 42 F. 587.

In state cases, a second prosecution has been barred where the jury was discharged through the trial judge's misconstruction of the law. *Jackson* v. *Superior Court*, 10 Cal. 2d 350, 74 P. 2d 243, 113 A. L. R. 1422; *State* v. *Spayde*, 110 Iowa 726, 80 N. W. 1058; *State* v. *Callendine*, 8 Iowa 288; *Lillard* v. *Commonwealth*, 267 S. W. 2d 712 (Ky.); *Mullins* v. *Commonwealth*, 258 Ky. 529, 80 S. W. 2d 606; *Robinson* v. *Commonwealth*, 88 Ky. 386, 11 S. W. 210; *Williams* v. *Commonwealth*, 78 Ky. 93; *Yarbrough* v. *State*, 90 Okla. Cr. 74, 210 P. 2d 375; *Loyd* v. *State*, 6 Okla. Cr. 76; 116 P. 959.

Where the trial judge has made a mistake in concluding that the jury was illegally impanelled, or biased, a second prosecution has been barred. *Whitmore* v. *State*, 43 Ark. 271; *Gillespie* v. *State*, 168 *Ind.* 298, 80 N. E. 129; *O'Brien* v. *Commonwealth*, 72 Ky. (9 Bush.) 333; *People* v. *Parker*, 145 Mich. 488, 108 N. W. 999; *State* v. *Nelson*, 19 R. I. 467; *State* v. *M'Kee*, 17 S. C. L. (1 Bail.) 651, 21 Am. Dec. 499; *Tomassen* v. *State*, 112 Tenn. 596, 79 S. W. 802. See also *Hilands* v. *Commonwealth*, 111 Pa. St. 1, 2 A. 70, 56 Am. Rep. 235 as limited by *Commonwealth* v. *Simpson*, 310 Pa. St. 380, 165 A. 498. Cf. *Maden* v. *Emmons*, 83 Ind. 331.

The accused has also been discharged where the trial judge erred in his estimate of the prejudicial quality of the remarks made by counsel for the accused, *Armentrout* v. *State*, 214 Ind. 273, 15 N. E. 2d 363, or of the jurors drinking beer which had been brought in by the bailiff. *State* v. *Leunig*, 42 Ind. 541.

its performance at the trial. I do not see how a mistrial directed because the prosecutor has no witnesses is different from a mistrial directed because the prosecutor abuses his office and is guilty of misconduct. In neither is there a breakdown in judicial machinery such as happens when the judge is stricken, or a juror has been discovered to be disqualified to sit, or when it is impossible or impractical to hold a trial at the time and place set. The question is not, as the Court of Appeals thought, whether a defendant is "to receive absolution for his crime." 282 F. 2d 43, 50. The policy of the Bill of Rights is to make rare indeed the occasions when the citizens can for the same offense be required to run the gantlet twice. The risk of judicial arbitrariness rests where, in my view, the Constitution puts it—on the Government.